

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

In the Matter of

Review of the Commission's  
Regulations Governing Broadcast  
Television Advertising

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MM Docket No. 95-90

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**COMMENTS OF MEDIA ACCESS PROJECT**

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August 28, 1995

No. of Copies rec'd 079  
List A B C D E

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## SUMMARY

The "network control of station advertising rates" rule and the "network advertising representation" rule are not only simple and effective in operation, but are necessary both to promote competition and to serve the public interest. While repeal may momentarily placate those who call for less oversight of the telecommunications industry, it would betray the pro-competitive goals that the Commission seeks to promote.

The Commission's several proposals to eliminate its rules governing the network-affiliate relationship in this and other pending proceedings, evidence a dangerous, all-at-once approach to deregulation. For each rule it is examining, the Commission has placed great reliance on a preliminary conclusion that the affiliates have enough power *vis-a-vis* the networks to deter or withstand any network abuse. But these estimates do not take into account the other rulemakings or the cumulative effect of wholesale repeal. Moreover, the sunsets of the financial interest and syndication rules ("FISR") and the Prime Time Access Rule ("PTAR"), as well as proposals to relax the television ownership restrictions, will have profound, and unpredictable, effects on the network-affiliate relationship. For the sake of informed policymaking, the Commission should wait to see the effects of these changes before considering further action.

Both rules simply and directly promote competition in the national advertising market and licensee autonomy in programming. The rates rule ensures free competition by preventing the networks from creating a price floor for national advertising below which their affiliates cannot charge. The representation rule is an equally simple safeguard. Network sales and national spot sales are still "inherently competitive," so good performance as a representative for its affiliates would diminish the sale of a network's own ad time. This intrinsic conflict of interest makes

it inconceivable that network representatives will act as unbiased, zealous agents in the sale of affiliate spot time.

The Commission questions, however, whether these anticompetitive effects could be deterred by antitrust and unfair competition laws. But there is no reason for the Commission to defer to antitrust laws in this case. Promotion of competition and diversity in broadcasting is part of its specialized mission. In any event, rules designed to prevent price-fixing and anticompetitive conduct before it occurs have become an area of FCC expertise and often are more effective than case-by-case antitrust enforcement.

The Commission's supposition that advertisers can substitute time on syndicated programming, cable networks, and MSOs for time on broadcast networks is fallacious. None of these sources of advertising time are "reasonably interchangeable" with the four major networks. The major broadcast networks remain the only programming services which are available for free to 100% of the American public. Network shows deliver more viewers to advertisers than any other medium. And nothing demonstrates this more clearly than the fact that sales of advertising on the four major broadcast networks is at an all-time high.

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**COMMENTS OF MEDIA ACCESS PROJECT**

Media Access Project ("MAP") respectfully submits these comments in response to the Commission's Notice of Proposed Rulemaking, FCC No. 95-226 (released June 14, 1995) ("*NOPR*"). The *NOPR* asks a number of questions about the possible anticompetitive effects and public interest implications of repealing two of its rules that govern the relationship between broadcast television networks and their affiliated stations. Specifically, the Commission is reexamining the "network control of station advertising rates" rule, 47 CFR §73.658(h) ("rates rule"), under which a network cannot enter an agreement with an affiliate which forbids, hinders, or penalizes the affiliate for fixing or altering its advertising rates for non-network programming. The Commission also proposes repeal of the "network advertising representation" rule, 47 CFR §73.658(i) ("representation rule") (hereinafter both rules collectively referred to as "rules"), which prohibits a network from directly or indirectly representing an independently-owned affiliate for the sale of the affiliate's non-network advertising time.<sup>1</sup>

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<sup>1</sup>MAP will use the same terms to refer to the various classes of advertising time that are used in the *NOPR*. In other words, "national advertisers" refers to companies that compete in geographic markets larger than a station's immediate locality. *NOPR* at ¶13. "Local advertisers," on the other hand, "serve a geographically limited, or local, market and therefore wish to purchase advertising that reaches only local consumers." *Id.* A "network advertisement" is time during network programming which is sold by the networks to national advertisers. *Id.* at ¶14. And a "national spot advertisement" is time sold by a local station to national advertisers, to air locally either during non-network programming or during network programming time which local affiliates reserve for their own use. *Id.* Local stations typically sell national spot advertising

MAP urges the Commission to act cautiously in this and several related dockets in which it seeks to reexamine rules that maintain the competitive balance between television networks and their affiliates. The rules at issue here are necessary both to promote competition and to serve the public interest. Both are examples of the Commission's expertise in constructing preventative antitrust measures: the rates rule is essentially a ban on price fixing, while the representation rule is essentially a ban on tie-ins.<sup>2</sup> Their repeal, especially in light of evidence that networks have the incentive and ability to use their power over affiliates in an anticompetitive manner, is tantamount to endorsing these illegal practices. Moreover, there has been no outcry - and particularly not from those parties whom the Commission believes will benefit from repeal - for elimination of the rules.

# **I. THE FCC SHOULD ACT CAUTIOUSLY IN THESE AND OTHER RELATED DOCKETS.**

In several pending rulemaking proceedings, including this one, the Commission has proposed eliminating the rules which help maintain the competitive balance between the networks and affiliates. *See, e.g., Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates*, FCC No. 95-254 (released June 15, 1995); *Amendment of Part 73 of the Commission's Rules concerning the Filing of Television Network Affiliation Contracts*, 10 FCC Rcd 5677 (1995). For each rule examined, the Commission has

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time through an outside consultant called a "national advertising representative." *Id.*

<sup>2</sup>A "tie-in" is defined as "an arrangement under which [a] vendor will sell one product only on [the] condition that [the] buyer also purchases another and different product." Black's Law Dictionary, 5th Edition (1979). In this context, it would mean that a network would offer its affiliation to a television station only on the condition that the station also retain the network as an advertising representative.

relied on its estimates that the affiliates have enough bargaining power *vis-a-vis* the networks to deter or withstand any network abuse. But these estimates do not take into account the other rulemakings or the cumulative effect of their wholesale repeal.

Moreover, two recent Commission actions - the sunsets of the financial interest and syndication rules ("FISR") and the Prime Time Access Rule ("PTAR")<sup>3</sup> - will have profound, and unpredictable, effects on the network-affiliate relationship. The repeal of FISR and PTAR will give networks far more influence over the affiliates' programming choices. MAP Comments, *In Re Review of the Prime Time Access Rule*, MM Docket No. 94-123 at 9-11 ("MAP PTAR Comments"). And there is uncertainty as to whether repeal might increase costs for both off-network and first-run syndicated programming, thereby affecting affiliates' profitability. See MAP PTAR Comments at 15. Without some indication of the effects of the repeal of these rules, the Commission cannot yet adequately assess whether the network-affiliate rules are still needed to advance the goals of diversity and localism. At the very least, the Commission should delay wholesale repeal of the rules governing the network-affiliate relationship until it has had an adequate opportunity to assess the effects of FISR and PTAR repeal.

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<sup>3</sup>FISR, which prohibited ABC, CBS and NBC from acquiring an ownership interest or syndication rights in programming, will sunset sometime in November, 1995. PTAR, which prevented networks from forcing affiliates to carry network and off-network programming during the access hour, will not sunset until July, 1996. It may take several months from the time of these sunsets, after there has been sufficient network entry into the syndication and programming markets, before the Commission can begin to analyze their effects on the network-affiliate relationship.

## II. THE RULES PROMOTE COMPETITION IN THE NATIONAL ADVERTISING MARKET, AND THEREFORE ENABLE AFFILIATES TO PROVIDE DIVERSE AND COMMUNITY RESPONSIVE PROGRAMMING.

The Commission has stated that advancing competition in the market for advertising directly implicates "the overall competitive position of local stations and, in turn, the stations' ability to present programming that best serves their communities." *NOPR* at ¶11. Thus, the Commission has acknowledged that maintaining competition would advance diversity and localism goals. Similarly, the Commission has noted that "competition for advertisers also affects the independence of affiliates from the networks, with implications not only for competition, but also for the diversity of programming available to viewers on a national scale." *Id.* at ¶12. After outlining previous findings that the rules fostered competition for advertisers, the Commission asks "whether these findings are accurate and relevant today." *Id.* at ¶13.

### A. The Rates Rule

The rates rule provides a direct benefit to the public because it ensures free competition in the advertising market. The rule operates to prevent the networks from creating a price floor for national advertising below which their affiliates cannot charge.<sup>4</sup> As MAP discusses below, the networks possess both the power and the incentive to raise their affiliates' national spot advertising rates. As a ban on price fixing, this rule promotes healthy competition for adver-

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<sup>4</sup>"All of the networks have engaged in practices which are contrary to the broad purpose of this rule and to the public interest in the maintenance of free competition. These practices have acted to restrict the freedom of the station to fix its national spot rate at will and to enter into competition with the network should it choose to do so." Network Broadcasting, Report of the Network Study Staff to the Network Study Committee, *reprinted in* Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess., (1958) ("Barrow Report") at 440.



tising. And the Commission has noted that competition for advertisers means competition for viewers, which results in the improvement of the overall quality of program service. *NOPR* at ¶11. "This is the essence of the American system of broadcasting....[H]ealthy and vigorously competitive television advertising markets are in the public interest." *NOPR* at ¶11.<sup>5</sup>

### **B. The Representation Rule**

Repeal of the representation rule would harm the public's interest in diverse programming because it would diminish competition in the advertising market and would restrain the affiliates from exercising free programming discretion.

First, since network sales and national spot sales are still "inherently competitive," it is a matter of common sense that network representation will "unavoidably" stifle competition. *Network Representation of Stations*, 27 FCC 697, 715 (1959). Nothing in the Commission's *NOPR* suggests otherwise. Network time and national spot time compete for the same advertisers. This raises an inevitable conflict of interest: good performance as a representative for its affiliates will diminish the sale of a network's own ad time. As revenue maximizers, the networks will act in the manner which most increases their overall revenue:

*[T]he conduct, by a network, of two operations so inherently competitive with each other unavoidably creates incentive to moderate or regulate the conduct of the less significant*

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<sup>5</sup>In the context of the antitrust laws, the Supreme Court has held that the power to fix prices, is so pernicious that it is *per se* harmful to competition: "The aim and result of every price fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, [this power] involves power to control the market and to fix arbitrary and unreasonable prices." *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

*operation in such a manner as to maximize the network's revenue and profits.*

*Id.* [Emphasis added]<sup>6</sup>

Whether the networks favor spot ads or network ads is irrelevant. The result would still injure competition and licensee autonomy:

These dual roles enable [the networks] to restrain competition between network and national spot television in a manner which can restrict the licensee's freedom and independence of action.

*Id.*

Thus, repeal of the rules would have the effect of limiting independent programming decisionmaking by licensees. At many small stations, the national advertising representative advises the licensee on programming decisions, such as which syndicated show can most effectively reach a certain demographic group. With a network representative supplanting this advisory role, and in a world without FISR and PTAR, affiliates will naturally be steered toward programming owned by the network. Furthermore, a network representative would have no incentive to advise programming decisions which strayed in any way from the network's wishes, even if they might better respond to local needs. For example, it is inconceivable that a network advertising representative would counsel an affiliate to preempt network programming to cover more popular local civic or sporting events.

Finally, another danger of network representation is that, should networks favor their own

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<sup>6</sup>The Commission found in the late 1950's that the dangers that the representation rule was meant to solve were very real. Nothing it says today has shown that anything has changed, it gives no proof that it is no longer true that "[n]o man can serve two masters." See *Network Representation of Stations*, 27 FCC at 700.

advertising time and sell less spot time, the revenue base of stations will decline.<sup>7</sup> To cut costs, licensees may reduce the amount spent on public interest programming such as coverage of local issues or children's educational programming. Smaller, marginally profitable affiliates or licensees in smaller markets may be forced to reduce their programming schedules or to go dark altogether.

The Commission speculates, however, that there may be a net benefit from repeal of the representation rule. It repeats a conclusion of the 1980 Network Inquiry Special Staff that the networks may be able to offer affiliates national spot representation with lower transaction costs than independent representatives. *NOPR* at ¶28, *quoting* Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (October, 1990) at 493. The Network Inquiry Special Staff assumed that economies of scale would result from networks' established contacts with national advertisers and extensive knowledge of network programming. *Id.*

But these arguments are unconvincing, since networks are not the only ones who have contacts with national advertisers and familiarity with network programming. Indeed, independent advertising representatives' success depends on cultivating these contacts and maintaining knowledge of programming.

Furthermore, if networks could represent affiliates in a more efficient manner, the affiliates, seeking to avail themselves of these efficiencies, would also be seeking repeal of the representation rule. Likewise, the advertisers might see that efficient representation would lower their

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<sup>7</sup>As a general matter, local broadcast affiliates receive about 45-50 percent of their revenue from national spot advertisements. An erosion of this source of revenue would, therefore, have a serious impact on a station's financial health.

costs for spot time and also support repeal. But neither of these parties are clamoring for this change. In fact, the network affiliates are actively opposing repeal.

In any event, even if the networks did realize economies of scale, there is no indication that they would ever pass them along to affiliates. Indeed, networks do not have the incentive to do so, because, unlike an independent ad representative, a network would not face pressures from competing representatives. Affiliates would be unlikely to take their business elsewhere in the face of possible retribution in other facets of the network-affiliate relationship.

### **III. THE RULES REMAIN NECESSARY BECAUSE THE NETWORKS CONTINUE TO MAINTAIN AN ADVANTAGE IN BARGAINING POWER OVER THEIR AFFILIATES.**

The Commission asks whether "networks possess sufficient bargaining power over their affiliates such that the exercise of this bargaining power would result in reductions of affiliate advertising revenues significant enough to inhibit the affiliates' ability to present programming that best serves its community." *NOPR* at ¶17. It states that if a station is in a market where another network is seeking affiliates, or if it can obtain programming in the syndication market, its bargaining power *vis-a-vis* the network will be increased. *Id.* at ¶¶17, 18. Alternatively, it notes that a network's power in a given market may be increased if it can choose between several stations vying for affiliation or if it could purchase a station outright. *Id.* at ¶18.

MAP has previously addressed these arguments at length and demonstrated that, for a variety of reasons, the networks still retain a large degree of bargaining power over their affiliates. Specifically, MAP has shown that the actual ability of affiliates to switch networks is extremely limited. First, the risks of switching to one of the newer networks, especially UPN and WB, are enormous; affiliates who dare to exercise this so-called "bargaining power" are

taking a huge financial leap of faith. MAP PTAR Comments at 8; MAP Affiliation Contracts Comments at 10-11; MAP Affiliation Contracts Reply Comments at 5-6.<sup>8</sup>

Moreover, and more importantly, networks - perhaps with an eye towards limiting affiliate switches - have increasingly compelled affiliates to enter into 10 year affiliation contracts. MAP Affiliate Contracts Reply Comments at 6; NASA Affiliate Contracts Comments at 6. Thus, the affiliates are effectively locked into long-term relationships with their current networks. Even where an affiliate wants to and is able to switch, it will only have the opportunity to do so if there is a network affiliation available. And the availability of a new affiliation may often depend on whether another network affiliate in the same market is also at the end of *its* contract.

Additionally, recent events may diminish the power of affiliates even further. As the Commission recognizes, it has proposed to raise the national television ownership limits to permit one entity to serve 50% of the aggregate national market. *NOPR* at ¶30. In addition, telecommunications legislation pending in both Houses of Congress would raise the national audience reach cap from 25% to 35%. S.652, 104th Cong., 1st Sess. §206(b)(1); H.R. 1555, 104th Cong., 1st Sess. §302(a).<sup>9</sup> Under either the Commission's or Congress' plan, networks could

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<sup>8</sup>To the extent that the Commission continues to rely on the affiliate switching of last year as an indication of affiliate power, MAP has shown that these switches were aberrations that occurred largely because of Fox's enormous investment in the parent company of its new affiliates. So it is by no means clear that these events reflect any actual change in power relationships. MAP PTAR Comments at 7-9; MAP Comments, *In re Amendment of Part 73 of the Commission's Rules Concerning the Filing of Television Network Affiliation Contracts*, MM Docket No. 95-40 (June 12, 1995) at 10 ("MAP Affiliation Contracts Comments").

<sup>9</sup>The House bill also would permit ownership of more than one television station in a local market, and ownership of more than one network and would lift almost all national and local cross-media ownership restrictions, *e.g.*, broadcast-newspaper, cable-network. See H.R. 1555, 104th Cong. 1st Sess. (1995).

increase the number of stations they own outright. The mere threat of a network being able to purchase a station in a market will increase the network's bargaining power over the affiliates in that market, *NOPR* at ¶18; MAP PTAR Comments at 6.<sup>10</sup>

**IV. FOR THE COMMISSION TO RELY ON ANTITRUST AND UNFAIR COMPETITION LAWS TO REMEDY ANTICOMPETITIVE ABUSES BY THE NETWORKS IS TO ABDICATE ITS STATUTORY MANDATE TO PROTECT THE PUBLIC INTEREST.**

The Commission seeks to reexamine the rules using the framework of a cost-benefit analysis. As for the benefits, the Commission raises questions concerning "not only the potential harm to be prevented [by the rule], but the likelihood that such harm will manifest itself and not be corrected through other means." *NOPR* at ¶15. It questions whether state unfair trade and federal antitrust laws would be effective in detecting and remedying any anticompetitive conduct by the networks. *Id.*

In fact, there is no reason for the Commission to defer to antitrust laws in this case. Promotion of competition is part of its mission, and administering rules designed to prevent price-fixing and anticompetitive conduct before it occurs has become an area of FCC expertise.<sup>11</sup>

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<sup>10</sup>Moreover, as discussed above, the sunsets of FISR and PTAR will also increase the temptations for networks to exert influence over affiliate advertising practices and diminish the affiliates relative bargaining power. See p. 3, *supra*. The Commission cannot accurately gauge the power of networks, let alone the ability of affiliates to withstand network coercion, until the effects of the repeal of FISR and PTAR are known.

<sup>11</sup>It is indeed ironic that the Commission suggests that the problem of anticompetitive broadcast network behavior might be adequately addressed by antitrust laws. On several recent occasions, the Commission has had to defend itself against attacks by critics who question the Commission's very existence on the basis, *inter alia*, that the public interest in communications can be adequately protected through antitrust enforcement alone. Keyworth, *et al.*, *The Telecom Revolution - An American Opportunity*, Progress and Freedom Foundation, at 69-70. MAP wonders if the Commission now concurs with its critics and agrees that its role in encouraging competition in communications markets is irrelevant.

In any event, history has shown that case-by-case enforcement of antitrust law is not always as effective as a prophylactic rule. As the divestiture of AT&T demonstrated, antitrust cases against large corporate defendants can often take years to complete and involve staggering legal costs. Different courts will reach disparate holdings on these antitrust issues, leading to a crazy-quilt of decisions on the permissible extent of network involvement. Also, the resources of the Justice Department's Antitrust Division are limited, so less obvious or less costly violations would be more likely to evade federal prosecution. And because litigation costs can be staggering, many private would-be plaintiffs may be dissuaded from bringing suit. Therefore, if the Commission decides to defer to federal antitrust laws, all but the most costly or flagrant cases of network abuse of power will slip through the net.

**V. THERE IS NOTHING TO CONSTRAIN NETWORKS' ABILITY TO RAISE RATES BECAUSE THERE ARE FEW, IF ANY, REASONABLY INTERCHANGEABLE SUBSTITUTES FOR BROADCAST TELEVISION NETWORKS.**

In questioning whether networks will be able to increase their profits by forcing advertisers to buy network advertising time, the Commission asks whether there are other sources of advertising time that are "reasonably interchangeable" with network advertising. *NOPR* at ¶20. If these other outlets provided substitutes for network or national spot advertising, it could "constrain a network's ability to profit by manipulating the national spot advertising rates of its affiliates." *Id.* As to what these substitutes might be, the Commission posits that advertising time on syndicated programming, cable networks, and cable MSOs may be reasonably interchangeable for network time. *Id.* at ¶21.

It is abundantly clear, however, that none of these sources of advertising time are "reason-

ably interchangeable" with the four major broadcast networks.<sup>12</sup> They remain the only programming services that are available for free to 100% of the American public. Conversely, an advertiser on cable networks is limited to the slightly more than 60 percent of the country that subscribes to cable, and almost certainly will reach an even smaller percentage because a particular network will not be carried on every cable system. Similarly, an advertiser using MSO time, besides having to enter into dozens of negotiations with various operators, will be limited to only a fraction of the audience it could reach through network television. And not even the two new broadcast networks, UPN and WB, are reasonably interchangeable substitutes: they reach nowhere close to 100% of American homes since they do not have affiliates in many markets. Their minuscule ratings reflect that fact.<sup>13</sup>

As a result, advertisers understand that major network shows will deliver more viewers. Network time on a popular show can reach upwards of 11 million viewing households. *See, e.g.,* "People's Choices: Ratings according to Nielsen, Aug. 7-13," *Broadcasting & Cable*, August 21, 1995, at 31. Any single network gets higher ratings than all cable networks combined. MAP PTAR Comments at 16. An advertiser would have to run its ad over and over again to have the same impact as one network screening. And unlike many cable channels whose programming appeals only to niche interests or narrow demographic groups, network television gives advertis-

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<sup>12</sup>When it refers to the "four major broadcast networks," MAP is referring to ABC, CBS, NBC and Fox. To the extent that MAP has in the past considered Fox other than a "major" network, it now believes that Fox has reached competitive parity with the other three networks.

<sup>13</sup>For example, for the week of August 7-13, 1995, UPN averaged a 2.0 rating and a 4 share. WB averaged a 2.7 rating and 5 share. Meanwhile, ABC led the big four networks with an 8.6 rating and 16 share. *Broadcasting & Cable*, August 21, 1995, at 31. Thus, over four times as many households, on average, watched ABC as watched UPN.



ers flexibility: most shows have broad appeal while others draw narrower audiences.

Yet the most compelling proof that advertisers feel that these other sources of ad time do not substitute for network time lies in their recent actions. Networks have experienced record-breaking upfront sales for the 1995-'96 season, up 30% from last year.<sup>14</sup> In the Commission's estimate, based on an *Advertising Age* study, advertisers spent over 5 times as much on network advertising than cable. *NOPR* at Appendix A. Assuming a relatively equal distribution of advertising expenditures between the four networks, this means that any one network received more ad dollars than all cable channels combined. The fact that advertisers consistently choose the networks over other sources of advertising time demonstrates that they evidently do not think that these other sources are reasonably interchangeable.

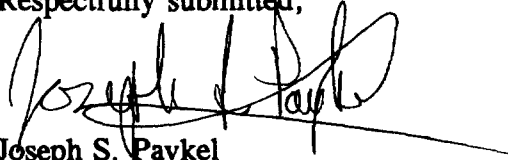
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<sup>14</sup>The four major networks reported estimated upfront advertising commitments totaling \$5.77 billion. Kevin Goldman, "Networks' Record Upfront Sales Could Prove to Be Mixed Blessing," *Wall Street Journal*, August 17, 1995, at B12. This is an increase from \$4.4 billion in advance sales for the 1994-'95 season, David Lieberman, "Networks grab reins from studios," *USA Today*, September 16, 1994, at B1, which itself was an increase of 20% from 1993-'94. *Id.* Advertisers flocked to Fox in such great numbers that it declared that its time for the 1995-'96 prime time season was "sold out." Goldman, *supra*, at B12.

## CONCLUSION

The rules are simple, effective ways to promote competition in the market for broadcast advertising. It makes no sense, from both a pro-competitive and a public interest perspective, to repeal them.

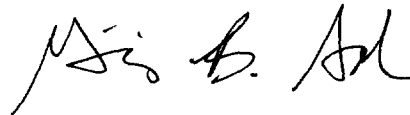
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August 28, 1995